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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-413

PHELPS DODGE REFINING CORPORATION,

Petitioner,

vs.

ISABEL ROBLEDO, CARLOS ROBLEDO, JR., MARY LOU ROBLEDO, also known as MARY LOU TORRES, SAMUEL ROBLEDO and YOLANDA ROBLEDO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

RICHARD T. MARSHALL
1238 Southwest National Bank Building
P. O. Box 888
El Paso, Texas 79945

JOHN C. STEINBERGER
310 American Bank of Commerce Building
El Paso, Texas 79901

SAM J. DWYER
710 Bassett Tower
El Paso, Texas 79901

Attorneys for Respondents

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Respondents, ISABEL ROBLEDO, CARLOS ROBLEDO, JR., MARY LOU ROBLEDO, also known as MARY LOU TORRES, SAMUEL ROBLEDO and YOLANDA ROBLEDO, urge that writ of certiorari be denied herein.

OPINION BELOW

No opinion has been published. On May 27, 1971, the United States Court of Appeals, in No. 71-1103, Summary Calendar, affirmed, per curiam, the judgment

of the United States District Court for the Western District of Texas. Thereafter on July 1, 1971, the Fifth Circuit Court of Appeals denied, per curiam, Petitioner's Petition for Rehearing and Petition for Rehearing En Banc. Copies of the Judgment of the District Court and the ruling of the Court of Appeals are set out in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are stated in the petition.

QUESTIONS PRESENTED

In its action the Court of Appeals for the Fifth Circuit affirmed the District Court's interpretation of Texas law. The petition poses the following questions:

1. Whether gross negligence was proved by Texas legal standards.

2. Whether the judgment below is in violation of the principles established in *Erie R. Co. v. Tompkins*, 58 S.Ct.817, 304 U.S.64, 82 L.Ed.1188 (1938); *Guaranty Trust Co. of New York v. York*, 65 S.Ct.1464, 326 U.S.99, 89 L.Ed.2079, 169 ALR 1231 (1945); and *Bernhardt v. Polygraphic Co. of America*, 76 S.Ct.273, 350 U.S.198, 100 L.Ed.199 (1956).

STATEMENT

The statement in the petition is substantially correct, subject to the following additions and corrections:

1. The platform had never been used prior to the day of the accident by other workers. The accident occurred the first time it was used in the furnace.

2. The cables from which the supporting rig was made had been permitted to lie in an outdoor warehouse yard for many months or years without proper protection (R. 67, 84).

3. Petitioner did not know when and from what source it had purchased the cable (R. 66, 178).

4. Petitioner's assistant master mechanic, who inspected and approved the cables and the rig, was unfamiliar with standards for storage of cables as set out in standard cable manuals, although such manuals were available to him (R. 51, 92).

5. Said assistant master mechanic had no experience in rigging a platform such as the one which collapsed, prior to the time of the accident. (R. 87).

6. The Petitioner's plant safety officer was not consulted in regard to the construction of the platform or the rigging. (R. 87).

7. The decedent was killed following a fall into a new furnace while carrying out a new and untried procedure for which there were no standard working rules or amendments to the safety lectures (R. 163).

8. There was no rescue equipment or procedures, and there had never been any rescue drills in connection with the new furnace.

9. The type of cable used was a light ¼-inch marine tiller rope, which was not designed for the purpose used at the time (R. 86). In fact, one expert stated it was the worst possible wire rope Petitioner could have used. (R. 125).

10. Respondents' decedent was killed while suspended in a hot oven in a procedure which had never been attempted in any refinery, to the best of Petitioner's assistant master mechanic's knowledge(R. 99).

11. Neither said decedent nor his co-worker on the platform had ever worked in such a hot environment before, in a closed furnace. (R. 149, 165).

12. The winch supposed to raise the platform was inoperative at the time of the accident. (R. 154). In the absence of rescue equipment the two men in the furnace had to be pulled out manually by two fellow-employees, resulting in a delay which proved fatal to the decedent. (R. 153, 171).

13. The temperature in the oven was approximately 250 degrees Fahrenheit, according to the estimate of the only survivor who was in the oven at the time of the accident(R. 151).

14. The platform was not suspended properly and was inherently wobbly (R.113). It was wobbly as it was lowered into the furnace (R. 151).

15. The blowers designed to cool the furnace were not operating at the time of the accident(R. 155).

ARGUMENT

The Texas definition of gross negligence is not simple, but complex. Although, as Petitioner argues, it includes an entire want of care such as would raise the belief that the injury was the result of conscious indifference, the cases cited by Petitioner, as well as other decisions of the Supreme Court of Texas, have consistently applied this definition to acts of omission as well as to acts of commission. *Bowman v. Puckett*, 144 Tex. 125, 188 S.W.2d 571. Further, "every instance of gross negligence includes one of ordinary negligence." *Bonnell v. Seitt*, 314 S. W. 2d 520 (Tex. 1958).

The determination of gross negligence must be made by the jury, under Texas law, on the basis of the combination of circumstances present at the particular time and place. *Fancher v. Cadwell*, 314 S.W. 2d 820 (Tex. 1958); *Harbin v. Seale*, 454 S.W. 2d 271. (Tex. 1970).

Texas courts are enjoined by precedent from disturbing jury findings under the circumstances

in workmen's compensation cases, and as Petitioner agrees, this case arose under the Texas Workmen's Compensation Act. *Texas Employers Insurance Assn. v. Washington*, 437 S.W.2d 340 (Tex. Civ. App.), writ ref., n.r.e.; *Travelers Insurance Co. v. Wade*, 373 S.W.2d 881 (Tex.Civ.App.), writ ref., n.r.e. Further, the Act must be liberally construed in favor of the claimant. *Hargrove v. Trinity Universal Ins. Co.*, 256 S.W.2d 73 (Tex. 1953).

In its charge to the jury the District Court took pains to spell out the Texas definition of gross negligence, and, in effect, repeated this definition three times. (R. 209-210). The jury obviously found from a preponderance of the evidence that "in placing the men over a hot furnace, that is, one that was not cooled off completely, using this cable that had been out and exposed to the elements and not having any safety precautions if there should be a fall," under the Court's Texas definition of gross negligence, that there *was* gross negligence. Petitioner's quarrel is with the jury on the facts; and not with the Court on the law. The jury must determine credibility of the witnesses.

The facts speak for themselves. The co-worker, Alfonso Ingo, survived the fall. He was a slight, wiry man who was able to climb out of the furnace in a minute. He weighed 140 pounds. Respondents' decedent weighed 240 pounds. (R. 159). When the two rescuers were pulling him up, he couldn't hold on, and he fell down again into the furnace. (R. 153). Petitioner was guilty of a willful and conscious indifference to the safety of the decedent in its failure to provide any rescue methods or equipment while subjecting him to extreme hazard in working in a new procedure in a hot furnace. It wasn't the fall that killed him, it was being baked alive while waiting to be pulled out! Petitioner in its argument concentrates on measures taken to prevent collapse of the platform; and ignores the total lack of care, and the conscious indifference to the question of how to get trapped employees out of the furnace. The jury obviously considered the death

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of Respondents' decedent the proximate result of two acts by Petitioner; and under the charge and the Texas law they did not have to find both acts constituted gross negligence, merely one. Obviously the second act, the failure to consider rescue, was gross negligence. Respondents here argue that the first act, the failure to provide safe equipment and conditions to prevent the collapse of the rig, was also gross negligence, although, it is submitted, this proof was not necessary to support the jury verdict.

This failure of Petitioner and its counsel to properly evaluate the facts proven as showing two separate and distinct acts of omission by Petitioner may explain its misunderstanding of why the Circuit Court of Appeals affirmed the judgment of the District Court without argument and without written opinion. In this context, it is obvious that there was no valid appeal on the law in the courts below, and, to employ a noun coined by the editors of United States Law Week, there is no certworthiness in this case. 40 LW 1046

Nor is there an *Erie* violation here. Petitioner would have the Court view the Texas gross negligence definition as fixed and immutable, when in fact the Texas Supreme Court, in the spirit of Holmes, J. views experience as the life of the law, and in recent years is calling for a rule of reason in the determination of gross negligence. *Fancher v. Cadwell, supra; Harbin v. Seale, supra.* The *Erie* doctrine does not require the Federal Courts to worship the sterile doctrines and stale dogmas of ancient state law. *Erie* requires Federal Courts to apply state law, and to apply is to construe, to interpret. As *Fancher* and *Harbin* clearly demonstrate, the Texas law of gross negligence is alive and growing.

Petitioner complains that the question here is important because it sets precedent which will "encourage forum-shopping". Respondents are really somewhat disappointed because the decisions below were *not* published, and did *not* thus amount to much in the way of precedent. Respondents, having lost their husband and father, would like to feel

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that the action of the Courts below in applying and reaffirming the gross negligence law of Texas under the Texas Workmen's Compensation Act has had a salutary effect in encouraging a basic consideration for human safety in Texas industrial plants.

CONCLUSION

The Petition for Writ of Certiorari here is no more than a request that the Supreme Court review the weight of the evidence in a jury trial. There is neither an *Erie* question nor any other question here justifying certiorari.

WHEREFORE, Respondents pray that the Petition be denied.

Respectfully submitted,

RICHARD T. MARSHALL
1238 Southwest National Bank Building
P. O. Box 888
El Paso, Texas 79945

JOHN C. STEINBERGER
310 American Bank of Commerce Building
El Paso, Texas 79901

SAM J. DWYER
710 Bassett Tower
El Paso, Texas 79901

By
RICHARD T. MARSHALL

CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondents hereby certifies as follows:

(a) That I am a member of the Bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Brief in Opposition to Petition for Writ of Certiorari.

(b) That the names and post office addresses of each attorney of record for the adverse party are as follows:

Mr. William J. Mounce

Mr. John A. Grambling

Mr. Harold L. Sims

Post Office Address of each of said attorneys:

P. O. Drawer 1977
El Paso, Texas 79950

(c) That on this day I served three printed copies of the foregoing Brief in Opposition on each of said attorneys for said Petitioner, by depositing same in the United States Post Office in El Paso, Texas, with first class postage prepaid, properly prepaid, properly addressed to each said attorneys.

EXECUTED this 15th day of October, 1971.

RICHARD T. MARSHALL, Attorney
for Respondents.

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